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13 UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF WASHINGTON
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18 UNITED STATES

19 Plaintiff,

20 v.

21 ANDREI S. BORGHERIU,

22 Defendant.

CASE NO. 4:22-cr-6040-SAB-1

UNITED STATES' RESPONSE TO
MOTION IN LIMINE "TO
CONFORM THE GOVERNMENT'S
CASE TO PRIOR ORDERS" (ECF
No. 116)

February 10, 2025 at 9:30 a.m.

Richland, WA- With Oral Argument

23 The United States of America, by and through Vanessa R. Waldref, United
24 States Attorney for the Eastern District of Washington, Frieda K. Zimmerman and
25 Jeremy J. Kelley, Assistant United States Attorneys, respectfully submits this
26 response to Defendant's Motion in Limine to Conform the Government's Case to
27 Prior Orders (ECF No. 116). Despite being styled as a request to require the United
28 States to conform with prior orders of the Court, Defendant's Motion is an attempt
to relitigate issues the Defense previously lost. As Defendant's motion requests that
the United States be prevented from presenting factually accurate testimony that the
Court has already concluded is admissible, this motion should be denied.

DISCUSSION

The Indictment charges that Defendant lied to the SBA to obtain nearly half a million dollars in economic injury disaster loan (“EIDL”) proceeds when he falsely and fraudulently certified to the SBA, on his Loan Authorization and Agreement for the EIDL, that he would only use the EIDL proceeds solely as “working capital to alleviate economic injury.” ECF No. 1 at 5.

The United States provided notice that it intended to solicit testimony from Mr. Ray Brown, an employee with the SBA who has extensive experience with the EIDL Program. ECF No. 26. The Defense moved to exclude testimony from Mr. Ray Brown. ECF No. 29. This Court denied the motion, concluding that “Mr. Brown’s testimony is reliable, given his experience, and is relevant because it goes to an element of the crime of wire fraud, specifically, that Defendant’s statements made as part of the scheme were material.” ECF No. 85 at 5. The Court also noted that “his testimony about the workings of the EIDL program is not being proffered as expert testimony, but as testimony under Rule 701.” ECF No. 85 at 4.

On Defendant’s behalf, the Defense proffered the testimony of Janet McHard, a forensic accountant. ECF No. 54, 91. The United States moved to exclude the proffered testimony, ECF Nos. 56, 94, and after careful consideration, Ms. McHard’s testimony was excluded by the Court. ECF No. 100. The Court concluded that Ms. McHard’s “qualifications do not match the issues to which her opinions are being offered.” ECF No. 100 at 2. The Court further stated that while Ms. McHard is qualified as a forensic accountant and certified fraud examiner, the opinions proffered were not relevant and would not be helpful to the jury. ECF No. 100 at 1, 2.

Several months later, the Defense moved for reconsideration of the Court’s order granting the United States’ motion to exclude Ms. McHard, contending that the exclusion denied Defendant his due process right to present a defense. ECF No. 105 at 3. The Court denied his motion, indicating “[t]here is no constitutional right

1 to present testimony of an unqualified expert.” ECF No. 106 at 3. ECF No. 106 at 3.

2 As the Defense points out in its motion, the Court made these rulings based
3 upon “relevance and foundation considerations.” ECF No. 116 at 3. The Court
4 concluded that, on one hand, Mr. Brown had an adequate foundation to offer his
5 proffered testimony and that it would assist the jury in determining a fact of
6 consequence, ECF No. 85, and concluded that, on the other hand, Ms. McHard did
7 not have an adequate foundation to offer her proffered testimony and that such
8 testimony would not assist the jury in determining a fact of consequence. ECF No.
9 100. Having lost arguments to the contrary on numerous other occasions, the
10 Defense now tries to conflate the relevance and evidentiary foundations for these
11 witnesses, which are distinct and separate, and which have been extensively
12 reviewed previously by the Court.

13 The Defense argues that since the Court excluded Ms. McHard’s testimony
14 generally discussing irrelevant matters and providing unreliable, unfounded
15 opinions, Mr. Brown should somehow not be allowed to offer general testimony
16 regarding the specific federal program the Defendant is charged with defrauding.
17 This is nonsensical. Defendant’s latest motion an additional attempt to relitigate this
18 already-decided issue. The United States has already set forth for the Court the
19 various reasons that Ms. McHard’s testimony is inappropriate, ECF Nos. 56, 61, 94,
20 and that Mr. Brown’s testimony is admissible and relevant, ECF No. 34. The Court
21 considered this briefing, along with Defendant’s briefing, and has issued three orders
22 regarding such proffered testimony—specifically that Mr. Brown had a sufficient
23 foundation to testify and offered relevant testimony and that Ms. McHard did not
24 have a sufficient foundation to testify and offered irrelevant and unhelpful testimony.
25 ECF Nos. 85, 100, 106.

26 In making these arguments, Defense counsel fails to appreciate the distinction
27 between the Court’s orders regarding two separate and distinct witnesses. For
28 example, Defendant fails to appreciate the distinction between testimony offered by

1 an individual (Mr. Brown) with extensive familiarity with the SBA’s EIDL program
2 and testimony offered by an individual (Ms. McHard) with no specific personal
3 knowledge of the EIDL program or any other topic on which she was offered as a
4 witness. The Defense further fails to appreciate the distinction between
5 circumstantial evidence that can be used to infer Defendant’s knowledge and intent
6 at the time he applied for and obtained EIDL funds, such as the EIDL program rules
7 that Defendant agreed to follow in submitting the loan documents, and pure
8 speculation offered by a third party without foundation as to what “may” have been
9 going on at the time Defendant submitted the EIDL documents. *See e.g.*, ECF No.
10 91 at 7 (“She will discuss, for example, how equipment, assets, and resources may
11 become unavoidably commingled or used for more than one purpose.”); 9 (“Ms.
12 McHard will opine that an EIDL may have been more expensive for Mr. Borgheriu
13 than other types of financing for the Sunshine property.”).¹ The two witnesses have
14 different professional experience and offer different testimony, and there is no basis
15 to conflate the two.

16 Nevertheless, in requesting the Court to, yet again, reconsider the testimony
17 of Mr. Brown and Ms. McHard, the Defense contends that “a fair trial means
18 evidentiary limitations apply equally to both parties.” ECF No. 116 at 4. This is
19 absolutely correct, and those limitations are set forth in the Federal Rules of
20 Evidence, which this Court has considered in reaching its conclusions as to the
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22 ¹ To the extent Defendant argues that the EIDL documents are not clear about the
23 rules of the EIDL program, this is something he can explore in cross-examining a
24 witness with knowledge of that program and its documents (Mr. Brown) or through
25 Defendant’s own testimony about his actual understanding of the program and intent
26 at the time he applied for the funds. As the Court has ruled multiple times, Ms.
27 McHard’s proffered testimony about these topics is without foundation, is
28 speculative, and is irrelevant.

1 relevance and admissibility of each witness's proffered testimony. Defendant
2 simply failed to carry his burden to show the admissibility of Ms. McHard's
3 proffered testimony under those Rules while the United States succeeded in carrying
4 its burden under the same Rules. Indeed, Defendant makes no specific argument in
5 his motion about these Rules, and the Court's application of them to each witness,
6 but simply asks the Court to conflate the testimony of Mr. Brown and Ms. McHard
7 and nonsensically apply its order regarding one specific witness to an entirely
8 separate witness, rather than examine each witness independently for foundation and
9 relevance, which the Court has already done numerous times. The motion offers no
10 basis for the Court to reconsider its orders regarding these witnesses a third time.

11 In compliance with prior orders, the United States intends to present testimony
12 from Mr. Brown, which the Court has specifically evaluated and concluded to be
13 relevant and admissible. ECF No. 85. The United States has no intention to call Ms.
14 McHard, whose testimony the Court has also specifically evaluated and concluded
15 is irrelevant and inadmissible. ECF Nos. 100, 106. Defendant's motion should be
16 denied.

17 Dated this 22nd day of January, 2025.

18
19 Respectfully submitted,

20 VANESSA WALDREF
21 United States Attorney

22 /s/Frieda K. Zimmerman

23 Frieda K. Zimmerman

24 Jeremy J. Kelley

25 Assistant United States Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to noticed counsel.

/s/Frieda K. Zimmerman

Frieda K. Zimmerman

Assistant United States Attorney